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No. 73-779

In the Supreme Court of the United States

OCTOBER TERM, 1973

MICHAEL LEMONAKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 485 F. 2d 941.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973. A petition for rehearing was denied on October 15, 1973 (Pet. App. C). The petition for a writ of certiorari was filed on November 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusion from evidence as hearsay of a suicide note, written by petitioner's alleged accomplice, deprived petitioner of his constitutional rights to a fair trial under the circumstances of this case.

2. Whether the trial court erred in admitting into evidence recordings of two conversations between the accomplice and petitioner which were made after petitioner had retained counsel.

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on five counts of burglary (22 D.C. Code 1801); five counts of grand larceny (22 D.C. Code 2201); three counts of interstate transportation of stolen property (18 U.S.C. 2314); and one count of conspiracy to commit the above described offenses (18 U.S.C. 371).[1] He was sentenced to five to fifteen years' imprisonment and a $10,000 fine. The court of appeals affirmed in a lengthy opinion (Pet. App. A).

[1] The text of the lengthy indictment is set out in the trial transcript (Tr. 3791–3817). Also charged in the indictment were co-defendants Paul Enten, Alfred Dolder and Harry Schmidt. Dolder entered pleas of guilty to certain counts and testified at trial as a government witness. Schmidt remained a fugitive until his death in 1971 (Pet. App. 2a, n. 1). Enten was convicted with petitioner. He has also filed a certiorari petition, No. 73–926, which presents one issue unrelated to the issues presented by this petition, and also objects to the recording of Scouloukas' conversations with him knowing he was represented by counsel. We do not believe that the issues raised in the two petitions are so similar that they must be considered together.

1. The facts are detailed in the opinion below (Pet. App. 3a–7a). During police investigation into a series of burglaries which had been committed in the Georgetown section of Washington, D.C. in 1969, suspicion began to turn toward James Scouloukas, a member of the Metropolitan Police Department, who resigned from the Department in December 1969 (Tr. 1956–1957; Pet. App. 4a). During the next six months, the investigation disclosed information implicating petitioner's co-defendant, Paul Enten, in the burglaries, and the matter was presented to a grand jury on June 3, 1970 (Tr. 1724; Pet. App. 4a). As the investigation into the burglaries continued, Scouloukas presented himself at the United States Attorney's office seeking immunity from prosecution; he was promised that his statements and their fruits would not be used against him in any prosecution (Tr. 1436–1437; Pet. App. 5a). Skouloukas died, apparently by suicide, one week before the trial started (Pet. App. 7a).[2]

Although the statements that Scouloukas made to the investigators were not admissible at trial and were not offered, there was ample evidence before the jury that Scouloukas was a principal participant in the burglaries; some of it showed or suggested that he had implicated petitioner in the crimes in his statements to the police (Tr. 3596–3597). The evidence included recordings of several telephone conversations between Scouloukas and petitioner (Tr. 1727–1728, 1741–1779, 1789–1833; Pet. App. 6a–7a); these record-

[2] At the time of trial, an investigation of the possibility that his death was a homicide was evidently being conducted (Tr. 7).

ings were made in an attempt to gather evidence to corroborate or refute the statements which Scouloukas had given the investigators concerning petitioner (Tr. 1727–1728; Pet. App. 6a). A total of five telephone conversations between petitioner and Scouloukas were recorded without petitioner's knowledge (Tr. 1727–1728; 1741–1779; 1789–1833). Petitioner cites the following conversations as demonstrating the prejudicial effect of the tapes (Pet. 7):

> SCOULOUKAS. Now this is the story he tells me that he told them—well, he got another piece resembles the piece that he took down there and that's his cover the stuff that come out of the big yellow house. Remember the big yellow house up the hill.
>
> LEMONAKIS. I don't know, but anyhow go ahead.
>
> * * * * *
>
> SCOULOUKAS. Remember the first load of stuff that we took out—me, you, and Dolder [unintelligible].
>
> OPERATOR. 3 minutes [unintelligible].
>
> SCOULOUKAS. O.K. Operator. Remember the first load of stuff we took out?
>
> LEMONAKIS. What the hell do I know.[3]

Scouloukas purportedly left a suicide note which petitioner attempted to introduce as exculpatory evidence (Tr. 1440; Pet. App. 26a). The relevant portion of the note read as follows (Pet. App. 26a):

> As far as [the U.S. Attorneys prosecuting the case] go—Mike Lemonakis had nothing to do

[3] Both of these conversations took place on August 20, 1970.

> with any robberies that I know of. I lied to them about Mike because even he hurt me with my family. But he is innocent.

The trial court ruled that the note was hearsay and unreliable, and excluded it from evidence (Tr. 2309–2311; 1440–1476).

2. Other sources at trial implicating petitioner in the crimes were as follows: co-conspirator Alfred Dolder (who had pleaded guilty) testified that he met Scouloukas and defendant Schmidt in February 1969, and discussed a proposed burglary in Pittsburgh, Pennsylvania (Tr. 284–D). The three men went to Pittsburgh, where they met petitioner and enlisted him in the proposed burglary (Tr. 295). Although this burglary was not committed, Scouloukas subsequently informed Schmidt and Dolder that he had obtained the "police list" from the Precinct, which contained the names of Georgetown residents whose homes would be vacant for specified periods of time. Schmidt called this list their "license to steal" (Tr. 298).

In late March 1969, Dolder met with Schmidt, Scouloukas, and petitioner at Scouloukas' home. The police list was discussed, and the home of Esther Lewis was chosen as a target for burglary (Tr. 299–300). Dolder related in detail the participation of the four in the burglary of this home on March 26, 1969 (Tr. 301–303). Following the burglary, the four men transported the stolen goods to Scouloukas' home in Maryland, where petitioner took a diamond engagement ring that had been stolen as his "compensation" for

his evening's work (Tr. 303–305). Mrs. Lewis testified that a diamond engagement ring was among the items of property stolen from her home (Tr. 16).

By August of 1969, the base of operations of the conspiracy was Schmidt's apartment in Maryland. A former girl friend of petitioner, Carole Corey, testified that petitioner was in the Washington area for about ten days prior to August 5, 1969. She joined him on that day and stayed with him at the Schmidt apartment for several days (Tr. 880, 934). After returning to Pennsylvania, she frequently spoke with him by telephone at the Schmidt apartment (Tr. 906–909).[4] During the several days that she stayed at Schmidt's, she saw Scouloukas there on a regular basis (Tr. 895–896).

Other persons observed the co-conspirators together in the Schmidt apartment and elsewhere. Giovanni Perelli saw Scouloukas and petitioner together in Washington in the summer of 1969 as they examined a list of addresses and talked about proposed burglaries (Tr. 1593). Perelli also saw them in the Schmidt apartment when they had silverware and items of jewelry on the floor of the bedroom (Tr. 1596). Jack Maynard, an associate of Schmidt, also saw a bedroom in the apartment cluttered with clocks, statuettes and silver (Tr. 999–1000). Another Schmidt associate, Herbert Knight, identified photographs of property stolen in the Georgetown burglaries which he

[4] The records of petitioner's employer, the McGraw-Edison Company in Canonsburg, Pennsylvania, showed that petitioner was not at work from July 25 through September 5, 1969 (Tr. 695–696).

had seen at the Schmidt apartment in 1969 (Tr. 1020–1029).

About August 9, 1969, the Georgetown residence of Thomas Blake was burglarized and $18,000 worth of his possessions were stolen. Mr. Blake had personally informed Scouloukas that his home would be vacant (Tr. 75). One of the stolen articles was an elaborate "Geisha Doll" in a glass case (Tr. 76–77). A doll exactly fitting the description of the Blake doll was given by petitioner to Carole Corey before she returned to Pennsylvania from Washington on August 9.

The home of Lady Norma Lewis was also burglarized in late August, after she had informed the Seventh Precinct that she would be away from her home (Tr. 127). During the trial, petitioner's co-defendant, Paul Enten, returned a large amount of Lady Lewis' stolen property, including a painting which bore petitioner's fingerprint (Tr. 3452–3458, 3476). Enten testified that he obtained the painting in a transaction at the Schmidt apartment in Maryland (Tr. 2764–2766).

Jack Maynard testified that Scouloukas, in the presence of petitioner, gave him two pieces of antique porcelain which had been stolen from the Charles home in late August 1969 (Tr. 1001).

In the fall of 1969, petitioner, together with Scouloukas and Perelli, went to the antique store of Harold Schreiber in New York, where they offered to sell him a collection of framed documents, including a framed picture signed by George Washington (Tr. 1490–1496). Schreiber suspected that the items had

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been stolen (Tr. 1506), and they had in fact been stolen on September 6, 1969, from the home of the late George Marshall (Tr. 169–170, 3465).

3. Petitioner's defense consisted of evidence tending to show Scouloukas' animosity to him, and suggesting that, as a result, Scouloukas had falsely accused him (Tr. 3096, 3114–3115).

To refute the direct testimony of Dolder regarding his participation in the Esther Lewis burglary on March 26, 1969, petitioner introduced the stipulated testimony of one of Mrs. Lewis' neighbors, who looked at the back porch of Mrs. Lewis' home each morning as she walked her dog along the canal and did not notice any damage or break-in until March 26 (Tr. 2402–2403). It was also shown through representatives of petitioner's employer that petitioner was at work in Pennsylvania on March 25 and 26 (Tr. 663).

To meet the evidence on the tape recordings, petitioner's counsel tried to show on cross-examination (Tr. 2009–2010) and in his final argument (Tr. 3657–3660) that nothing incriminating was said by petitioner.

ARGUMENT

1. The court below held that "once [the recordings of conversations between petitioner and Scouloukas] were introduced in support of the Government's case, we believe it error for the trial judge to have considered only the technical hearsay grounds in determining the admissibility of the suicide note" (Pet. App. 28a). The court was of the opinion that, in these unique circumstances, "fairness to both sides" re-

quired that the note should have been presented to the jury (Pet. App. 28a). Having said that, however, the court concluded that exclusion of the note was harmless error because "(1) the probative value of the recordings was of a limited nature, their effect on the jury thereby capable of being offset by (2) Lemonakis' impeachment, without use of the note, of whatever part of Scouloukas' recorded statements were taken by the jury as true and implicating him, both reasons to be considered in light of (3) the substantial independent evidence of Lemonakis' guilt introduced by the Government" (Pet. App. 28a–29a). Although we agree with the court that any error was clearly harmless, we submit that no error was in fact committed and that the suicide note was properly excluded from evidence.

a. As the court below recognized, the note did not have indicia of trustworthiness and reliability justifying its admission (see Pet. App. 26a–27a, n. 24). It was hardly comparable to the hearsay deemed admissible in *Chambers* v. *Mississippi*, 410 U.S. 284.[5] As the Court there pointed out, 410 U.S. at 300–302:

> The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided *con-*

[5] In *Chambers*, this Court was faced with the issue whether the defendant in a state trial was deprived of due process under the Fourteenth Amendment by the exclusion of exculpatory hearsay evidence (as well as by state rules of evidence which prevented a party from impeaching the testimony of his own witness). The defendant, Chambers, who was being tried for the murder of a policeman, attempted to elicit the testimony of witnesses that a person named McDonald had told them that he, not Chambers, shot the policeman. The trial court had excluded the testimony on the grounds that it was hearsay.

> *siderable assurance of their reliability.* First, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case * * *. The sheer number of independent confessions provided additional corroboration for each. Third * * * each confession here was in a very real sense self-incriminating and unquestionably against interest. * * * Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and had been under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury. * * * *The availability of McDonald significantly distinguishes this case from* * * * [similar cases where] *the declarant was unavailable at the time of trial.* [Emphasis added.]
>
> * * * * *
>
> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

The factors which this Court felt in *Chambers* "provided considerable assurance" of the reliability of the hearsay evidence are not present in this case. First, Scouloukas' declaration of Lemonakis' innocence in the suicide note did not occur until almost a year after Scouloukas had commenced cooperating with the investigators (Pet. App. 5a, 7a). Second, corroborating evidence of petitioner's innocence was, to say the

least, very weak, while many witnesses testified at trial concerning petitioner's involvement in the burglary ring, and much of their testimony was uncontroverted. Third, there were several theories propounded to explain why Scouloukas might have retracted his prior accusations against petitioner, all of which raised serious questions as to the reliability of the retraction (Tr. 1449–1450, 1463, 1465–1466, 1471). Finally, and most important, the declarant, Scouloukas, was dead, and hence unavailable for cross-examination.

b. Nor do we accept the proposition below that "fairness to both sides" (Pet. App. 28a) dictated the admissibility of the suicide note. This conclusion stems from the fact that since the recordings submitted by the government were introduced, it became appropriate, the court thought, that "the jury * * * be presented with information favorable to the defense the reliability of which, like that favorable to the Government, had to be established without access to the source of the information" (Pet. App. 28a). But this rationale assumes that the recordings had a material impact in the case;[*] it also overlooks the basis of the admission of the recordings, which turned, not on general concepts of fairness, but on settled rules of evidence.

Petitioner challenged the admissibility of the *tape recordings* in the court below on the ground that their admission deprived him of his right to confront a

[*] That assumption is inconsistent with the court's express finding that the probative value of the recordings was limited and "capable of being offset by [petitioner's] impeachment, without use of the note * * *" (Pet. App. 28a–29a).

witness (Scouloukas) against him (Pet. App. 8a–13a). The court below held that admission of the tapes did not deprive petitioner of his Sixth Amendment right for the following reason (Pet. App. 10a–11a):

> Scouloukas' statements would accompany those of Lemonakis *not as evidence of the truth* of the former's contents but, to the extent to which the appellant's responses constituted incriminating admissions of his own, to make those responses intelligible to the jury and recognizable as admissions. That the statements were made is all that is important, and the recordings themselves suffice to establish that. The right to cross-examine the absent informant under oath, to test his recollection, prove his motives, and permit the jury to consider his demeanor is therefore inapplicable, and hearsay considerations do not operate as a bar to admissibility. *United States* v. *Castro*, 438 F. 2d 468, 473 (7th Cir.), *cert. denied*, 402 U.S. 977 (1971). [Emphasis added.]

Thus, the portion of the recordings containing Scouloukas' remarks were not admitted for the truth of their content but to explain petitioner's responses. In *Dutton* v. *Evans*, 400 U.S. 74, 89, this Court stated:

> The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *California* v. *Green*, 399 U.S., at 161. * * *

Here, "the truth of the prior statement"—Scouloukas' statements on the recording—was not at issue; therefore, the mission of the confrontation clause could scarcely be advanced by admitting conceded hearsay[7]—the suicide note—to refute an issue not before the jury. In short, there is no reason to treat the two items as comparable evidence, the admission of one requiring the admission of the other. Moreover, even if the jury may have improperly considered Scouloukas' statements in the recordings on the issue of petitioner's guilt, a case is still not made out for admission of the note. The recordings themselves had only marginal evidentiary value. Petitioner presented evidence to show that Scouloukas had vowed to "get" him for intervening in Scouloukas' domestic affairs (Tr. 3100, 3114–3115); he was therefore sufficiently enabled to impeach Scouloukas' motive and intent in implicating him in the crimes without reliance upon the unreliable and hearsay suicide note (Pet. App. 28a–29a).

c. At all events, even assuming *arguendo* that "fairness to both sides" suggests that the note should have been admitted, the opinion of the court below is sufficient to withstand petitioner's attack upon it as a "substantial erosion" of the constitutional harmless error rule (Pet. 12–13). The court below reviewed the record summarized in the statement, *supra*, pp. 3–8, and manifestly concluded "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24; *Brown* v. *United States*, 411 U.S. 223, 230–

[7] See Pet. App. 26a, n. 24.

232; *Harrington* v. *California,* 395 U.S. 250. It therefore found the error harmless. The court's failure to cite the relevant cases in this Court is not significant, since it properly applied their teaching.

2. After having been served with a subpoena to testify before the grand jury investigating the crimes, petitioner consulted with counsel, who met with the investigators on August 18, 1970. Petitioner's counsel was informed that his client was a suspect in possible offenses connected with the Georgetown burglaries, whereupon he advised the government attorneys that petitioner would refuse to testify before the grand jury and would make no statement to the government (Pet. App. 7a). It should be noted that three of the five taped conversations introduced at trial had already been made, *before* petitioner's counsel met with the government attorneys; the fourth was recorded on the day of that meeting and the last one two days later, on August 20, 1970 (Pet. App. 7a). At no time during the period was petitioner in custody, and he was not formally indicted until five months later (Pet. App. 2a, n. 1).

In these circumstances, no Sixth Amendment right to counsel was violated. See *Kirby* v. *Illinois,* 406 U.S. 682; *United States* v. *Ash,* 413 U.S. 300; *Hoffa* v. *United States,* 385 U.S. 293, 309–310; *Wallace* v. *United States,* 412 F. 2d 1097 (C.A.D.C.), certiorari denied, 402 U.S. 943. Petitioner argues, however, that the admission of the recordings violated "constitutional principles of Due Process and fair trial," because the recordings were obtained in violation of "a

prosecutor's professional ethics" (Pet. 13–14). As the court below held (Pet. App. 23a–25a), there was no violation of prosecutorial ethics which deprived petitioner of his constitutional rights when Scouloukas tried to elicit incriminating statements from him at a time when his status was that of a suspect who had not been indicted and was not in custody. *Hoffa* v. *United States, supra,* 385 U.S. at 309–310; *United States* v. *Thomas,* 474 F. 2d 110 (C.A. 10), certiorari denied, 412 U.S. 932.

Furthermore, in light of the other overwhelming evidence of petitioner's guilt, as well as the limited value of the tapes to the government's case—petitioner said little, if anything, on the tapes that was incriminating (Pet. App. 28a–29a)—any error in admitting the two tapes was harmless beyond a reasonable doubt. *Milton* v. *Wainwright,* 407 U.S. 371.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974